Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,

80-2142

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

ANGELO C. PAPPALARDO, ET AL.,

*Petitioners,*

-against-

PARKLANE HOSIERY COMPANY, INC., and

HERBERT N. SOMEKH,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH

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## QUESTION PRESENTED

Was the order of the Court below correct in affirming the judgment of the District Court which, in the exercise of its discretion and after a full hearing and consideration of objections, approved the settlement of this class action?

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## STATEMENT OF THE CASE

Respondents Parklane Hosiery Company, Inc. and Herbert N. Somekh (collectively "Parklane" unless otherwise indicated by context) refer to the Statement of the Case contained in the brief filed herein by class counsel, which sufficiently states the facts and history of the case.

## REASONS FOR DENYING THE WRIT

A. No basis has been shown by petitioners to bring this case within the jurisdiction of, nor to warrant consideration by, this Court. Petitioners concede there is no constitutional question (A-3). No conflict among decisions of Federal Courts of Appeal has been shown nor does the petition present any questions of importance affecting federal

law.

The unanimous order of affirmance of the Second Circuit (A-94 to A-96) recited in summary form the procedure employed by the District Court in finding the proposed settlement to be fair, adequate and reasonable. In approving, the Circuit Court noted that the objectors (petitioners here) were left with both State and Federal remedies which they could pursue if they opted not to participate in the approved settlement. Citing this Court's policy of encouraging and supporting such settlements, the Second Circuit concluded that there was no abuse of discretion by the District Court, and affirmed. Thus the Second Circuit affirmed the District Court's conduct in hearing, evaluating and approving the settlement and in exercising its broad discretion based upon

the mosaic of litigation history, legal and factual questions presented, probability of success and other relevant criteria. The policy of this Court not to disturb the discretionary judgments of lower courts in class action settlements is reflected by the fact that, so far as our research shows, this Court has never reversed nor entertained appeals from such judgments.

> E.g., In re General Motors Corp. Engine Interchange Litigation, 594 F. 2d 1106 (1979), certiorari denied, General Motors Corp. v. Oswald, 100 S Ct. 146; Pettway v. American Cast Iron Pipe Co., 576 F. 2d 1157 (1978), rehearing denied 581 F. 2d 267, certiorari denied, 99 S. Ct. 1020, 439 U.S. 1115, 59 L. Ed. 2d 74 (1979); Airline Stewards and Stewardesses Ass'n, Local 550, TWU, AFL-CIO v. American Airlines, Inc., 573 F. 2d 960 (1978); certiorari denied, Association of Professional Flight Attendants v. Airline Stewards and Stewardesses Ass'n, Local 550, TWU, AFL CIO, 99 S. Ct. 214, 439 U.S. 876, 58 S. Ed. 2d 190

(1978); Equal Employment Opportunity Commission v. American Tel. & Tel. Co., 556 F. 2d 167 (1977), certiorari denied, Alliance of Independent Tel. Unions v. Equal Employment Opportunity Commission, 98 S.Ct. 3145, 438 U.S. 915, 57 L. Ed. 2d 1161 (1978); Communications Workers of America v. Equal Employment Opportunity Commission, 98 S. Ct. 3145,438 U.S. 915, 57 L.Ed 2d 1161 (1978); Telephone Coordinating Council TCC-1, Intern. Broth. of Elec. Workers v. Equal Employment Opportunity Commission, 98 S. Ct. 3145, 438 U.S. 915, 57 L. Ed. 2d 1161 (1978); Pearson v. Ecological Science Corp. 522 F. 2d 171 (1975) rehearing denied, 525 F. 2d 1407, certiori denied; Skydell v. Ecological Science Corp., 96 S. Ct. 1508, 425 U.S. 912, 47 L. Ed. 2d 762 (1976); Flinn v. FMC Corp. 528 F. 2d 1169 (1975), certiorari denied, 96 S. Ct. 1462, 424 U.S. 967, 47 L.Ed. 2d 734 (1976); Grunin v. International House of Pancakes, 513 F. 2d 114 (1975), certiorari denied, 96 S.Ct.124, 423 U.S. 864, 46 L. Ed. 2d 93 (1975); Air Lines Stewards & Stewardesses Ass'n, Local 550, TWU, AFL-CIO v. American Airlines, Inc., 455 F. 2d 101 (1972), appeal after remand 490 F. 2d 636, certiorari denied, 94 S. Ct. 2406, 416 U.S.

993, 40 L. Ed. 2d 773 (1974); Trans World Airlines Inc. v. Zipes, 94 S. Ct. 2406, 416 U. S. 993, 40 L. Ed. 2d 773 (1974).

An analysis of the legal questions presented by petitioners as the bases for issuance of a writ shows that they are not based upon claimed legal error by the courts below. Rather, they suggest a misapprehension by the District Court of the weight which should have been given to various legal and factual contentions made by the petitioners in support of their objections to the settlement. In effect, therefore, the most which petitioners claim is that the exercise of the District Court's discretion should have been influenced by petitioners' arguments more than it apparently was.

B. Their principal argument is that the District Court did not, in eval-

uating the reasonableness of the settlement, adequately weigh the possible benefit to the class of a claim against respondent Somekh on a theory characterized as "unjust enrichment." The District Court decision(A-1 to A-70) reveals that petitioners' contentions were fully understood and were carefully weighed (A-26 to A-31) by the District Court in arriving at a contextual determination that the proposed settlement met the criteria enumerated by the decided cases and by Rule 23(e)F.R.Civ.P.

Petitioners' suggestion that the short Second Circuit order of affirmance is in conflict with this Court's decision in Affiliated Ute Citizens v. U.S. 406 U.S. 128 (1972) is without merit. Affiliated Ute held, so far as relevant, that defendent bank officials violated a duty of disclosure in arrang-

ing the sale of stock owned by the mixed-blood plaintiffs and should be held for the amount of profit they made in fraudulently manipulating the sales and making themselves the buyers for profitable and undisclosed resale of some of the shares (406 U.S. at 155). Here there was no such demonstrated undertaking to, and no transaction by Somekh with or on behalf of, class members. Class counsel was aware of petitioners' theory and nevertheless argued, and the District Court agreed, that the application of this legal theory to this case and the difficulty of proving the necessary facts, including damages, made it unlikely that the net result would have been sufficiently, if any, better for the class so as to warrant continued litigation and rejection of the benefits of the settlement.

C. Petitioners' further suggestion that the decision below conflicts with this Court's decision in Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979) is wholly incorrect. The Parklane decision held that Parklane was estopped from collaterally relitigating the three proxy violations (one misrepresentation and two omissions) found to have occurred by the Court in the earlier SEC case against Parklane [Securities and Exchange Commission v. Parklane Hosiery Company, Inc., 422 F. Supp. 477, aff'd, 558 F.2d 1083 (2d Cir. 1977)]. The decision applying collateral estoppel did not compel any specific future course of the litigation, nor was it relevant to the anticipated quantum, if any, of provable damages to the class or the appropriate terms of a settlement.

D. The claim that the Second Cir-

cuit affirmance below conflicts with In re General Motors Corporation Engine Interchange Litigation, 594 F. 2d 1106, certiorari denied, 444 U.S. 870 is equally remote. In General Motors the Seventh Circuit reversed the District Court's approval of the settlement of a complex multi-class litigation because counsel for one of a number of classes arrogated to himself the negotiation and conclusion of a settlement without proper or sufficient communication with and participation of counsel for other classes or subclasses. There is no useful analogy to the instant case.

The language of the Seventh Circuit quoted by petitioners with respect to the duty of the trial court to "undertake a stringent examination of the adequacy of representation by the main class representatives and their

counsel at all steps of the litigation ...." (594 F. 2d at 1124, quoted in the petition at p. 24) warrants comment. Petitioners had attempted three times to intervene generally in this case, and were denied general intervention by three District Judges (Judges Tyler, Wyatt and Haight). Thus petitioners represented no class or subclass in this action. Moreover, petitioners moved to disqualify class counsel for claimed inadequacy of representation on two occasions, which motions were denied. The Second Circuit's order below affirmed by necessary implication those portions of the District Court's decision which rejected petitioners' applications for the discharge of class counsel and the substitution of a new class representative (A-15 to A-22). The scrutiny which the Seventh

Circuit in General Motors suggested should be employed by the trial court with respect to the conduct of class counsel was in fact exercised by the district judges below at the insistence of the petitioners, and the performance of class counsel was expressly approved.

E. While not precisely relevant to the merits of the instant petition, it should be noted that the Second Circuit in a prior appeal in this action [Shore v. Parklane Hosiery Company, Inc., 606 F. 2d 354, 358 (1979)] expressly observed that petitioners' efforts at intervention were motivated by a desire to delay consideration of the settlement until an unrelated state court appraisal proceeding would be determined. The result was a two-year postponement in final consideration of the proposed settlement, during which time the prior ap-

peal to this Court was argued and decided.[1] With this perspective, it appears

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1. Petitioners' brief (p. 8) incorrectly states that class counsel and Parklane counsel had failed to advise this Court of the existence of a proposed settlement. To the contrary, counsel jointly advised the Clerk of this Court that a proposed settlement had been filed with the District Court and that counsel were awaiting the outcome of motions (made by petitioners here for intervention) after which it was anticipated a notice of the proposed settlement would be sent to shareholders for a settlement hearing. We inquired whether in these circumstances the Court would be willing to postpone its hearing of the case inasmuch as approval of the settlement would make the appeal moot. The Clerk advised us that no such postponement was available and that the appeal would be argued as scheduled. His advice was consistent with an observation made by this Court in Coopers & Lybrand v. Livesay, 437 U.S. 463, 465 fn. 3 (1978) that a pending proposed settlement does not moot an appeal to this Court.

that the petitioners successfully, even if temporarily, confounded and frustrated the policy of the federal courts to encourage and facilitate class action settlements.

## CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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